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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 597

WILLIAM J. CLEARY,

Petitioner,

v.

CHICAGO TITLE and TRUST COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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UNITED STATES LAW PRINTING CO., CHICAGO 10, ILL., LA KEVIEW 8-6581

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Petitioner, William J. Cleary, prays that a Writ of Certiorari issue directed to the Supreme Court of Illinois to review the judgment of the Supreme Court of Illinois affirming a judgment of the Superior Court of Cook County, Illinois.

Opinion Below.

The official report of the Opinion of the Supreme Court of Illinois is reported in 4 Ill. (2d) 57.

A copy of this Opinion appears in the Appendix.

Date of Judgment Below.

The date of the judgment of the Supreme Court of Illinois, sought to be reviewed is September 23, 1954. It was entered on the same date, September 23, 1954.

Date of Order in Respect of Rehearing.

The only order in respect of a rehearing is the order denying it, which was entered November 15, 1954.

There was no order granting any extension of time.

Jurisdiction.

The statutory provision believed to confer jurisdiction on this Court to review the judgment entered by the Supreme Court of Illinois is U.S.C.A. Title 28, Section 1257(3).

Questions Presented.

The questions presented for review are:

(1) Whether a Court can be constituted of members who have not taken the oath of office, prescribed by clause 3 of Article VI of the Constitution of the United States?

(2) Whether a "judgment" of a Court constituted of members who have not taken such an oath of office as prescribed by the third clause of Article VI of the Constitution is a valid judgment.

The Constitutional Provision.

The Constitutional provision which this case involves is Clause 3 of Article VI of the Constitution of the United States. It follows:

> "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

STATEMENT OF THE CASE.

Petitioner, William J. Cleary, sued Respondent, Chicago Title and Trust Company in the Superior Court of Cook County, Illinois, on a judgment entered in the Municipal Court of Chicago, Illinois, February 20, 1946. (R. 3A, pp. 1-7).

Respondent filed a motion to dismiss the complaint showing that the Appellate Court of Illinois, First District, had reversed the critical judgment of the Municipal Court of Chicago and that such judgment of the Municipal Court of Chicago thus rendered was of no force and effect. (R-3A Abst. 9)

Replying to the motion to dismiss made by the respondent, the petitioner challenged the existence of the Appellate Court of Illinois, First District, and the orders and judgments thereof invoking, *inter alia,* Article VI, Clause 2 (*Sic* 3) of the Constitution of the United States requiring that all judicial officers of the States "shall be bound thereby by an Oath or Affirmation, to support both the Federal and the State Constitutions". (R-3A, Abst. 14).

It is not contended that any of the judges of the Appellate Court of Illinois, First Division, ever took an oath of office as a judge of the Appellate Court of Illinois. (R-3A, Abst. 27-28)

The Superior Court of Cook County allowed the motion to dismiss. (R-3 Abst. p. 58)

An appeal was taken to the Supreme Court of Illinois. (R-3A Abst. p. 59)

Respondent argued the question presented here in its original brief in the Illinois Supreme Court, (R-3C p.

13, 20-22) and again in its petition for a rehearing (R-10 p. 3 of such petition).

The Appellate Court of Illinois, First District consists of three divisions or branches each of which has three purported judges. One of these branches made the purported judgment. (R-AA, App. 111-128).

Reasons Relied On For The Issuance Of The Writ.

The reasons relied on for the issuance of a Writ of Certiorari is that the Supreme Court of Illinois has *sub silentio* decided a federal question of substance which has never been decided by this Court: *i.e.*, is a so-called State Court properly constituted, if the members thereof have not subscribed to the Oath of Office prescribed by Clause 3 of Article VI of the Constitution of the United States, and if not, is the judgment of such a Court binding on litigants who have submitted themselves to the so-called jurisdiction of such a court.

In Illinois, it is well settled that in the absence of a proper qualified judge, judgments are void and "mean no more than the blank pages on which they were written", *The People, ex rel Chicago Bar Association* v. *Feinberg,* 348 Ill. 549, 566. To like effect is *The People of the State of Illinois* v. *Sullivan,* 371 Ill. 264. There is no need then to discuss the questions which ordinarily revolve around the doctrine of *de facto* courts. But, if it were admitted that the foregoing principle does not apply, the Appellate Court of Illinois, First Division would not be a *de facto* court. In Illinois a *de facto* institution arises out of necessity. Where, as here, the Supreme Court of Illinois stood ready to take appeals, the Appellate Court could not be a *de facto* court. In *The People* v. *Brautigan,* 310 Ill. 478-482, it was held that a grand jury which assumed to be acting under color of title but which in fact was void could not be deemed

to be acting as a *de facto* grand jury, since there was a valid grand jury functioning. So long as the Supreme Court of Illinois sits, no necessity could arise which would justify the recognition of the Appellate Court as a *de facto* court because of any compelling necessity.

Obviously it is no answer to these questions to say that the Judges sitting in the Appellate Court of Illinois once took the required oath as judges of the Circuit Court of Cook County, (Illinois) or as judges of the Superior Court of Cook County, (Illinois). The oath they took as judges of the Circuit Court or Superior Court could not bind them as judges of the Appellate Court. In the time lag between their induction as a judge of the Superior Court or a Circuit Court, each individual member might have an entirely different state of mind which would militate against the taking of the new oath.

Since there is no authoritative decision on this subject rendered by this Court, we turn to other authoritative sources. In Ferrand's Records of the Federal Convention Vol. II, p. 88 (Yale University Press Edition MCMXI) we find Mr. Gerry, one of the delegates explaining to the members of the convention that he thought one good effect would be produced by the requirement that all state officers be bound to support the Constitution of the United States.

> "Hitherto", he said "the officers of (the two) governments had considered themselves, as distinct from, not as parts of the-General system and had in all cases of interferences given preference to the State Govt's. The proposed oath would cure that error".

In The Federal No. 27, Hamilton said of this provision:

> "Thus the legislatures, courts and magistrates, of the respective members, will be incorporated into the

> operations of the national government as far as its just and constitutional authority extends; and it will be rendered auxilliary to the enforcement of its laws".

Pinckney (the younger) expressed the same notion in the Philadelphia convention.

> "They (the States) are the instruments upon which the Union must frequently depend for the support and execution of their powers." Constitution of the United States, Legislative Reference Service. Library of Congress Legislative Service, Corwin, Editor (1953) page 736.

It seems self-evident that the judges of state court derive in part, their authority to act as judges of such courts from compliance with the mandate of Clause 3 of Article VI of the Constitution and thus the right of those who pretend to exercise the titles and privileges of judges of the state courts are necessarily claimed under the Constitution of the United States.

If these be the proper interpretations of the constitutional provision, as they undoubtedly are, it follows that every state judicial officer holds his office by virtue of his having taken the oath required by Clause 3 of Article VI of the Constitution of the United States and that in the absence of the taking of such oath he is not a judge of a State court. Applying that reasoning to the instant case: No oath, no judge; no judge, no court; no court, no judgment.

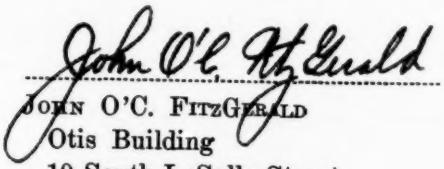
That this is a matter of great importance in the administration of our dual system of government is beyond cavil.

Petitioner is informed that at least one other state, New York, does not require the taking of a new oath by judges who are elevated from one court to another. Continued lazity in failing to require compliance with the provisions of Clause 3 of Article VI would, as the makers of the Constitution envisioned, lead to great mischief.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted



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APPENDIX.

OPINION OF THE SUPREME COURT OF ILLINOIS.

Docket No. 33046—Agenda 17—May, 1954.

William J. Cleary, Appellant, v. Chicago Title and Trust Company, Appellee.

Mr. JUSTICE KLINGBIEL delivered the opinion of the court:

On November 15, 1952, William J. Cleary filed a complaint against Chicago Title and Trust Company in the superior court of Cook County, alleging that in 1946 he recovered a judgment for $209,000 against defendant in the municipal court of Chicago, and that defendant has failed to pay the same. He prayed for judgment in said amount with statutory interest thereon. Defendant filed a verified motion to dismiss the action on the ground that the municipal court judgment had been reversed by the Appellate Court without remandment. The motion was accompanied by a certified copy of the Appellate Court's opinion in that case (*Chicago Title and Trust Company* v. *Cleary,* 334 Ill. App. 397,) together with a certified copy of the final judgment entered in accordance therewith. Plaintiff then filed "objections" to the motion, in which he alleged the Appellate Court is not a valid court and its judgment is therefore a nullity. After hearing arguments of counsel the court granted defendant's motion to dismiss the action. Plaintiff appeals to this court.

Article VI, section 11, of the constitution of this State ordains in part that the appellate courts therein authorized "shall be held by such number of judges of the circuit courts * * * as may be provided by law;" and the

General Assembly has provided by statute that this court "shall assign twelve of the judges of the circuit court of this state to duty in the appellate courts." (Ill. Rev. Stat. 1953, chap. 37, par. 29.) Appellant's attack on the judgment of reversal is based on the contention that the Appellate Court is not lawfully constituted because (1) its judges are appointed by this court instead of by the Governor, (2) they include superior court judges as well as circuit court judges, and (3) they take no oaths and receive no commissions, other than their oaths and commissions as circuit or superior judges.

It is unnecessary to consider appellant's arguments on the merits since, as appellee correctly points out, the Appellate Court judgment cannot be collaterally attacked in the present proceeding. The rule is well settled in this State that a collateral attack on a judgment will not be sustained unless an absence of jurisdiction to enter it appears on the face of the record (see *Steffens* v. *Steffens,* 408 Ill. 150, 153,) and that the appointment of public officers cannot be questioned in a mere collateral proceeding. See *Golder* v. *Bessler,* 105 Ill. 419, 426.

Moreover, it does not appear that the present appellant in any way asserted the objection when the former case was brought to the Appellate Court. Instead he submitted himself to its jurisdiction. Under such circumstances he must be deemed to have waived any complaint he might have concerning the organization of the court. See *People* v. *Link,* 365 Ill. 266, 290.

Even if appellant had the right in this case to question the legality of the appointment of Appellate Court justices, his contention could not prevail. If we assume the invalidity of their appointment it would still confer a color of office,

and the judgments rendered thereunder would be valid. See *Samuels* v. *Drainage Comrs.*, 125 Ill. 536, 540; *People ex rel. Ballou* v. *Bangs*, 24 Ill. 184, 187.

Appellant maintains further that affidavits submitted with his objections show appellee tampered with members of the jury at the time of the trial in the municipal court; that in the public interest such alleged attempts to improperly influence the jurors, even though unsuccessful, require that appellee be deprived of any benefit from the subsequent Appellate Court judgment; and that appellant is entitled to a jury trial on the issue thus raised. It is a sufficient answer to such contention to observe that no complaint is made of fraud in the procurement of the Appellate Court judgment, the validity of which is the sole issue herein; and that it is undisputed appellant was not prejudiced by the alleged misconduct in the trial court. Appellant's arguments are so lacking in merit that further discussion is unnecessary. The judgment of the superior court is clearly correct, and will be affirmed accordingly.

Judgment affirmed.

JUDGMENT OF COURT BELOW.

UNITED STATES OF AMERICA

State of Illinois,
Supreme Court—ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of September in the year of our Lord, one thousand nine hundred and fifty-four, within and for the State of Illinois.

Present: George W. Bristow, Chief Justice

Justice William J. Fulton — Justice Joseph E. Daily

Justice Walter V. Schaefer — Justice Ralph L. Maxwell

Justice Harry B. Hershey — Justice Ray I. Klingbiel

Latham Castle, Attorney General

Harry G. Newman, Marshal

Attest: Earle Benjamin Searcy, Clerk

Be It Remembered, that, to-wit: on the 23rd day of September 1954, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

William J. Cleary,
Appellant

No. 33046 vs.

Chicago Title and Trust Co.,
a corporation,
Appellee

Appeal from
Superior Court
Cook County
52 S 16750
Error to

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and in-

spected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Superior Court of Cook County aforesaid, Be Affirmed In All Things And Stand In Full Force And Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant Costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 14th day of February 1955.

SEAL

Earle Benjamin Searcy
Clerk,
Supreme Court of the State of Illinois.

FILED
MAR 10 1955
HAROLD B. WILLEY, Clerk

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vs.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

Petitioner filed suit in the Superior Court of Cook County, Illinois, on November 15, 1952, to recover on a judgment entered in his favor by the Municipal Court of Chicago on February 20, 1946. Respondent moved to dismiss on the ground that Petitioner's suit was barred by a prior judgment of the Appellate Court of Illinois, which had reversed the Municipal Court judgment. The Superior Court dismissed the complaint. On direct appeal by Petitioner to the Supreme Court of Illinois, that court affirmed the order of dismissal. *Cleary* v. *Chicago Title and Trust Company,* 4 Ill. 2d 57.

Respondent had perfected an appeal to the Appellate Court of Illinois in 1946 from the Municipal Court judgment sued upon. Petitioner had appeared on that appeal and attempted to sustain the judgment. The Appellate Court reversed without remanding. *Chicago Title and Trust Company* v. *Cleary,* 334 Ill. App. 397. Thereafter the Supreme Court of Illinois dismissed a writ of error to review the Appellate Court decision (R. 16). This Court subsequently denied Petitioner's request for certiorari. *Cleary* v. *Chicago Title and Trust Company,* 336 U. S. 904, 921.

The validity of the organization of the Appellate Court of Illinois was not raised by Petitioner when he was in that court, when he sought a review of that court's judgment by writ of error from the Illinois Supreme Court, or when he previously sought a writ of certiorari from this Court.

Petitioner now urges that the Appellate Court judgment was a nullity because the judges of that court took no oath of office upon their assignment to that court. This proposition was first urged by Petitioner in opposing Respondent's motion to dismiss the Superior Court action.

The court of last resort in Illinois is the Supreme Court. The General Assembly of Illinois was authorized to create inferior appellate courts by Article VI, Section 11, of the Constitution of 1870. Such courts were established by legislative act in 1877. By statute the Supreme Court assigns judges of the circuit courts to duty in the appellate courts. Ill. Rev. Stat. 1953, Chap. 37, § 29, p. 1257. Before entering upon the duties of their office, circuit court judges are required to take an oath of office. Ill. Rev. Stat. 1953, Chap. 37, § 72.2, p. 1262. They do not take any additional oath upon assignment to duty in the appellate courts.

In the opinion and judgment of the Supreme Court of

Illinois, sought to be reviewed by the writ in this case prayed, the Court did not decide whether or not judges assigned to appellate courts must take an additional oath under Article VI, of the Constitution of the United States. The Court simply held that under settled Illinois law neither the judgment of the Appellate Court nor the right of the judges thereof to hold office could be collaterally attacked.

Argument.

It is clear from the opinion of the Supreme Court of Illinois that no federal question has been passed upon. All that has been decided is that under established Illinois procedural law Petitioner was not entitled in a collateral proceeding to a decision on the question he now urges.

Where, as here, a state court judgment rests on adequate and independent state grounds, no federal question having been decided and no decision of a federal question being necessary to a determination of the case, this Court will not review the state court decision. *Southwestern Bell Telephone Company* v. *Oklahoma,* 303 U. S. 206, 212-213; *Howat* v. *Kansas,* 258 U. S. 181, 186, 189-190; *Enterprise Irrigation District* v. *Farmers Mutual Canal Company,* 243 U. S. 157, 164. Thus a decision that the litigants have chosen the wrong remedy or forum does not present a question for review. *Edelman* v. *California,* 344 U. S. 357, 361; *Honeyman* v. *Hanan,* 302 U. S. 375, 378. Similarly, a ruling that a prior judgment constitutes a bar to the action does not present a federal question. *Kenney* v. *Craven,* 215 U. S. 125, 129-130; *San Francisco* v. *Itsell,* 133 U. S. 65, 67; *Chouteau* v. *Gibson,* 111 U. S. 200, 201. So where a state court, as here, holds that a prior judgment cannot be attacked collaterally, there is no federal question to be reviewed by this Court. *Hibben* v. *Smith,* 191 U. S. 310, 325.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

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